IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 129 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

KANTILAL R PATEL

Appearance:

1. INCOME TAX REFERENCE No. 129 of 1986

MR BB NAIK, for Petitioner No. 1

MR BD KARIA, for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 18/06/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

At the instance of the revenue, following two

questions are referred to this Court :-

1. Whether on the facts and in the circumstances of the case and in law the Tribunal was right in holding that the revision order u/s. 263 of the C.I.T. was invalid, based on the decision of the Madhya Pradesh High Court reported in (1982) 130 ITR 518 ?
2. Whether on the facts and in the circumstances of the case and in law it can be said that as the I.T.O's order merged with the order of the C.I.T. (A) giving thereby the C.I.T. no jurisdiction to pass the revisional order u/s. 263 directing the ITO to charge the interest u/s. 215 of the Act eventhough the question of chargeability of the interest u/s. 215 was not subject matter of appeal before the C.I.T. (A) ?

2. In this case, the Commissioner of Income-tax had exercised revisional powers under Section 263 of the Income-tax Act, 1961 while passing an order on 29.3.1984 wherein he had come to the conclusion that the interest was chargeable upon the assessee under Section 215 of the Act and the same was not charged by the Income-tax Officer on finalization of the assessment under Section 143(3) on 31.3.1982. The order of assessment was, therefore, erroneous and prejudicial to the interests of the revenue. The Commissioner, therefore, directed the Income-tax Officer to charge the same under Section 215 of the Act by passing appropriate order.

3. The said order of the Commissioner was challenged in appeal by the assessee before the Income-tax Appellate Tribunal, Ahmedabad and the Tribunal, vide its order dated 22.10.1985 and for the reasons recorded therein had come to the conclusion that there was no financial loss to the revenue. While recording that finding, the Tribunal had followed the decision of the Madhya Pradesh High Court in the case of H.H. Maharaja Raja Pawer Dewas vs. CIT, (1982) 138 ITR 518 and had held that the revisional order passed by the Commissioner under Section 263 of the Act was invalid and was not sustainable.

4. Being aggrieved by the said order of the Tribunal, the revenue had preferred a reference application before the Tribunal under Section 256 (1) of the Act and while drawing the statement of case, the above two questions were referred to this Court for its

opinion.

5. We have heard Mr BB Naik,learned counsel appearing for the revenue and Mr BD Karia, learned advocate appearing for the respondent-assessee.

6. So far as the first question is concerned, the Tribunal has proceeded on the footing that there was no financial loss to the revenue and hence the assessment order was not erroneous and prejudicial to the interest of revenue and hence order passed under Section 263 of the Act was not valid. For arriving at this finding, the Tribunal accepted the contention urged on behalf of the assessee that the interest under Section 217 has been charged and if the said aspect was taken into account, there was no prejudice to the revenue. The Tribunal has construed the meaning of the word "prejudice" as actual loss of revenue i.e. a financial loss.

7. It is argued on behalf of the revenue that the Income-tax Officer has not charged the interest under Section 215 of the Act though it was chargeable under that Section. The assessee has filed return of income and declared the income of Rs.1,02,676/-. The return was subsequently revised declaring the total income of Rs.2,02,126/-. The assessment was framed on the total income of Rs.2,37,861/- and tax payable thereon was calculated at Rs.1,40,203/-. Even after getting certain reliefs in appeal from the Commissioner of Income-tax (Appeals), the tax was reduced to Rs.1,16,364/-. As against this, the assessee had paid advance tax of Rs.10,005/- on estimate. Thus, it was obviously less than 75% of the "assessed tax" as defined in Section 215 of the Act.

8. Even otherwise, the difference in tax as contemplated under Section 215 of the Act gives rise to charging of interest under that Section. This Court has recently held in the case of Sarabhai Chemicals Pvt. Ltd. vs. CIT, (2002) 173 CTR Guj. 193, after following the decision of the Supreme Court in the case of I.S.A.L. Narayan Row vs. Ishwarlal Bhagwandas reported in AIR 1965 SC 1818, that no discretion is left and charging of interest is automatic under Section 215 of the Act. Since interest was not charged by the Income-tax Officer when the assessment was framed, the order was erroneous to that extent and hence it was prejudicial to the interest of the revenue. In this view of the matter, we hold that the the Tribunal was not right in taking the view that the revisional order passed by the Commissioner of Income-tax under Section 263 of Act was invalid. The

Tribunal was also not justified in relying on the decision of the Madhya Pradesh High Court (Supra). We, therefore, answer this question in negative i.e. in favour of the revenue and against the assessee.

9. As far as the second question is concerned, Mr BB Naik, the learned standing counsel for the revenue submitted that following a Special Bench decision of the Tribunal in the case of Shree Aruna Mills Ltd. vs. ITO, the Tribunal has taken the view that the entire order of the Income-tax Officer was merged in the order of the Commissioner of Income-tax (Appeals) and, therefore, the Commissioner could not exercise revisional powers under Section 263 of the Act. This view taken by the Tribunal is not correct in view of the decision of the Supreme Court in the case of CIT vs. Shri Arbuda Mills Ltd. reported in 231 ITR 50 wherein it is held that the powers of the Commissioner under Section 263 of the Act shall extend and shall be deemed always to have extended to such extent as had not been considered and decided in such appeal. We, therefore, answer this question in the negative i.e. in favour of the revenue and against the assessee.

The reference is accordingly disposed of with no order as to costs.

(M.S. Shah, J.)

(K.A. Puj, J.)

sundar/-